Supreme Court, U.S.
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No. 93-1038

In the Supreme Court of the United States

OCTOBER TERM, 1993

SPENCER I. JORDAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a pretrial custodial interview of a suspect who waived his right to counsel is permissible under *Minnick* v. *Mississippi*, 498 U.S. 146 (1990), where the suspect had previously consulted with an attorney but had never requested counsel.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-26a, is reported at 38 M.J. 346. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 27a-40a, is reported at 35 M.J. 856. The prior opinion of the Court of Military Appeals, Pet. App. 43a-74a, is reported at 29 M.J. 177. The prior opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 75a-86a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1993. The petition for a writ of certiorari was filed on December 29, 1993. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

1. Petitioner is a member of the United States Navy. On February 2, 1985, petitioner and Seaman Thomas Hardnett, Jr., persuaded petitioner's roommate, Petty Officer Gregory Swafford, to drive them from the Norfolk Naval Air Station to the city of Norfolk, Virginia. GX 24, at 1. Hardnett had previously told petitioner that he intended to rob Swafford once they reached their destination. In Norfolk, Hardnett instigated an argument with Swafford, which resulted in a physical struggle. *Id.* at 2. During the struggle, petitioner restrained Swafford while Hardnett killed him. Petitioner then stole Swafford's wallet. *Id.* at 3. Swafford's body was loaded into the trunk of his car, driven to a nearby creek, and dumped into the water. *Ibid.* When Swafford did not return to the base, petitioner and Hardnett said that they last saw Swafford when they dropped him off in town. Pet. App. 44a.

The Navy began an investigation that lasted for several months. Along with dozens of other sailors, petitioner was interviewed concerning Swafford's disappearance. Petitioner gave his initial statement to a Naval Investigative Service (NIS) agent on February 8, 1985. GX 4. Petitioner was not a suspect at that time. On April 3, Swafford's body was discovered after it surfaced in a creek in Chesapeake, Virginia. Tr. 266. Because a camera strap was tied around Swafford's neck, foul play was suspected. Since petitioner and Hardnett were the last persons to see Swafford alive, they were interviewed again by civilian and military authorities. Detective Griggs of the Chesapeake Police Department and Naval Investigative Service (NIS) agent Cashman, who had

been investigating Swafford's disappearance, cooperated in the investigation.[1]

Hardnett was questioned in Norfolk, while petitioner was questioned in Gaeta, Italy, where his ship was deployed. Petitioner's account of events on the night Swafford disappeared differed in several respects from the version Hardnett gave. Petitioner nonetheless clung to the story that he and Hardnett had concocted. Pet. App. 45a-47a.

On July 22, a letter written by Hardnett was seized during a consent search of petitioner's shipboard locker. The letter explained that Hardnett had spoken to the authorities, and it instructed petitioner to conform his version of events to Hardnett's. GX 7B. After advising petitioner of his rights, an NIS agent confronted petitioner with Hardnett's letter. Petitioner then began to change his story. Petitioner said that Hardnett killed Swafford after Swafford made a homosexual advance to Hardnett. Petitioner, however, continued to deny that he ever touched Swafford. Petitioner was flown back to Norfolk on July 26. In further discussions with Navy authorities, petitioner said that he tried to break up the fight between Swafford and Hardnett, but that Hardnett pushed petitioner into Swafford in a way that pressed petitioner's forearm across Swafford's throat.

Petitioner was then ordered into pretrial confinement. Tr. 63, 79, 87. On July 30, a Navy attorney, Lieutenant Stephen A. Stallings, was notified that he would represent petitioner. Tr. 125. The next day, petitioner met

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[1] Because the investigation pre-dated this Court's decision in *Solorio* v. *United States*, 483 U.S. 435 (1987), it was not clear at the outset whether the military courts would have jurisdiction over the offense; for that reason, local law enforcement authorities played a significant role in the investigation.

with Lieutenant Stallings for about two hours at the Norfolk Naval Station Brig. Tr. 126; Pet. App. 5a, 8a.

The military authorities subsequently relinquished custody of petitioner to a Chesapeake police detective. Tr. 76. Petitioner was taken to police headquarters, where he was given the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Tr. 77. Petitioner waived his rights and agreed to speak to the police without counsel present. Tr. 78; GX 24, at 1. Petitioner subsequently admitted the truth about Swafford's death. Petitioner then led the Chesapeake police to the alleyway in Norfolk where Swafford was killed.

After learning that the murder was committed in Norfolk, the Chesapeake police relinquished custody of petitioner to the Norfolk police. Petitioner was again advised of his *Miranda* rights by the Norfolk police, and he waived those rights. On August 3, petitioner made another statement that was consistent with his July 31 statement. The local authorities in Virginia ultimately decided to return petitioner to the military for prosecution, and charges were returned against petitioner under the UCMJ. Pet. App. 51a-53a, 55a.

2. At trial, petitioner moved to suppress his July 31 and August 3 statements on the ground that they were taken in violation of Mil. R. Evid. 305 and the Sixth Amendment. AX 1, at 5-7. Petitioner also claimed that his August 3 statement was obtained in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), because he had asked to speak with a lawyer after giving the statement to the police, but before signing it, and he was not given an opportunity to do so. AX 1, at 7-8.

Following a hearing, the trial court denied the motion. The court held that petitioner had been properly advised of his *Miranda* rights and had validly waived those rights before he was questioned on July 31 and August 3.

Tr. 168-169. The court found that petitioner did not ask to speak with a lawyer before signing his August 3 statement and that, even if he had requested a lawyer immediately before signing the statement, as he claimed, his request would have required the suppression of only his signature, not the entire statement. Tr. 169. Pet. App. 53a-54a.

At the conclusion of the trial, petitioner was convicted of unpremeditated murder, felony murder, conspiracy to commit robbery, and robbery, in violation of Articles 118, 81, and 122 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 881, and 922. Petitioner was sentenced to confinement for life, total forfeiture of all pay and allowances, reduction to the lowest enlisted paygrade, and a dishonorable discharge.

3. The Navy-Marine Corps Court of Military Review dismissed the unpremeditated murder specification, but otherwise affirmed the findings and sentence. Pet. App. 75a-86a. The court found that there was no evidence to suggest that petitioner made any request for counsel until after the August 3 interview, and that the authorities therefore did not violate petitioner's rights under *Edwards* v. *Arizona*, *supra*, by interrogating him in the absence of counsel. Pet. App. 84a.

4. The Court of Military Appeals affirmed by a divided vote. Pet. App. 43a-74a. In the lead opinion, Judge Cox rejected petitioner's claim that his July 31 and August 3 statements were obtained in violation of Mil. R. Evid. 305 and the Sixth Amendment. Pet. App. 56a-64a. Judge Cox also concluded that the admission of petitioner's July 31 and August 3 statements did not violate the principles of *Miranda*, for two reasons: (1) petitioner did not raise that claim at trial or on appeal, and (2) petitioner did not communicate to the military or civilian authorities that he wished to consult with an attorney before question-

ing. Pet. App. 64a-67a. Judge Sullivan concurred in the result on the ground that petitioner's July 31 and August 3 statements "were voluntary and were preceded by appropriate waivers of counsel." *Id.* at 68a.

Chief Judge Everett dissented. Pet. App. 68a-74a. He assumed that petitioner had asked to speak with a lawyer while he was in custody because Rule 305(f) of the Rules for Courts-Martial (R.C.M.) requires that counsel be appointed for a servicemember if he so requests. Pet. App. 68a-70a. Judge Everett added that, in his view, the Navy's assignment of Lieutenant Stallings to petitioner and petitioner's acceptance of Stallings' services "constituted the 'functional equivalent' of the request for counsel" required by *Edwards* and *Arizona* v. *Roberson*, 486 U.S. 675 (1988). Pet. App. 73a.

5. Petitioner sought review in this Court. Following this Court's decision in *Minnick* v. *Mississippi*, 498 U.S. 146 (1990), this Court granted the petition, vacated the judgment of the Court of Military Appeals, and remanded the case to that court for further consideration in light of *Minnick*. 498 U.S. 1009 (1990). The Court of Military Appeals in turn remanded the case to the Navy-Marine Corps Court of Military Review. Pet. App. 41a.

6. On remand, the Navy-Marine Corps Court of Military Review again affirmed petitioner's conviction. Pet. App. 27a-40a. The court noted that "[t]he record reflects and the parties on appeal all agree that [petitioner] at no time pertinent to these proceedings invoked before any interrogator, military or civilian, his right to counsel." *Id.* at 37a. The court further stated that it did not infer "from the fact that military authorities appointed military counsel while [petitioner] was in the brig prior to transfer to the civilian authorities that [petitioner] had invoked his right to counsel." *Id.* at 38a. Because the court interpreted *Edwards* and *Miranda* to require that

the suspect "make within the context of custodial interrogation some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police or criminal investigators," and because petitioner made no such statement prior to making the admissions that were introduced against him, Pet. App. 39a, the court concluded that petitioner's admissions were properly introduced against him at trial.

7. The Court of Military Appeals affirmed. Pet. App. 1a-26a. The court agreed with the court of military review that petitioner's case was not controlled by *Minnick*, and that petitioner's admissions were properly admitted at his trial. "[D]espite numerous rights-advisements," the court noted, petitioner "never invoked his right to counsel until after the statements in issue had been taken." *Id.* at 4a. The appointment of counsel on July 30, the court explained, "was apparently triggered by [petitioner's] brief detention in a Navy brig pending completion of the civilian investigation." *Id.* at 5a. But because petitioner never invoked his right to counsel in any way, and because he was advised of, and waived, his right to counsel each time he was questioned, the court concluded that "*Miranda*, *Edwards*, and *Minnick* were scrupulously honored." *Ibid.*[2]

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[2] Chief Judge Sullivan and Judge Wiss dissented separately. Chief Judge Sullivan concluded (Pet. App. 6a-11a) that petitioner's consultation with Lieutenant Stallings constituted an invocation of counsel, and that the subsequent questioning of petitioner outside the presence of counsel violated this Court's decision in *Minnick*. Judge Wiss agreed with the majority that the interrogations at issue in this case did not violate *Minnick*, because "there is no evidence in the record that [petitioner] triggered his Fifth Amendment right to counsel by requesting a lawyer in any way." Pet. App. 14a-15a. He concluded, however, that "the more protective

ARGUMENT

Petitioner claims that the trial court erred in admitting into evidence his July 31 statement to the Chesapeake, Virginia, police. Relying on *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and *Minnick* v. *Mississippi*, 498 U.S. 146 (1990), petitioner argues that he in effect invoked his right to counsel by consulting with Lieutenant Stallings after Stallings was appointed to assist him.[3] In particular, petitioner argues that his consultation with Lieutenant Stallings gave rise to "an ambiguity in Petitioner's desire regarding the assistance of counsel," and that the officers were therefore "under an obligation, before reinitiating questioning, to inquire further and clarify Petitioner's desire for counsel." Pet. 8.

1. At the outset, we note that petitioner has not properly preserved his claim for review in this Court. He did not object before or at trial to the introduction of his July 31 statement on the ground that it was obtained from him in violation of the principles of *Miranda* and *Edwards*. Instead, he claimed only that the statement was inadmissible under military law and the Sixth Amendment. See AX 1 (defense suppression motion). Petitioner has therefore waived his claim. Mil. R. Evid.

Mil. R. Evid. 305(e) was violated here" and that as a result petitioner's admissions should have been excluded from evidence at his trial. *Id.* at 15a.

[3] Under military law, personnel in pretrial confinement with no preferred charges pending against them, such as petitioner, are entitled to counsel upon request for the purpose of representation during a pretrial confinement hearing. R.C.M. 305(f). Often, counsel is automatically appointed in accordance with local practice. In this case, Lieutenant Stallings was appointed to represent petitioner, even though there is no indication in the record that petitioner requested the appointment.

103.[4] In addition, petitioner did not argue on his first appeal in either the court of military review or the Court of Military Appeals that the admission of his July 31 statement violated *Miranda* and *Edwards*. Instead, petitioner argued that his July 31 statement was inadmissible under military law and the Sixth Amendment, and that the military appellate courts should exclude that statement under their supervisory power.[5] Under these circumstances, petitioner has waived the claim presented in the petition. See, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).

2. On the merits, the Court of Military Appeals correctly held that the evidence of petitioner's admissions was properly admitted at his trial.

a. In *Davis* v. *United States*, cert. granted, No. 92-1949 (Nov. 1, 1993), this Court has before it the question of how the police should respond when a suspect, during custodial interrogation, makes an ambiguous statement

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[4] Rule 103, Mil. R. Evid., requires a "timely objection" to preserve error for appeal, absent plain error. Under military law, plain error "is not the equivalent of obvious error. Rather, '. . . plain error is only found in exceptional circumstances where the reviewing court finds that reversal is necessary to preserve the integrity and reputation of the judicial process, or to prevent a miscarriage of justice.'" *United States* v. *Webel*, 16 M.J. 64, 66 (C.M.A. 1983).

[5] As Judge Cox explained, "[petitioner] never claimed to have invoked a right to counsel: Trial defense counsel did not claim [that] he did; and even appellate defense counsel have not so contended. Until now, no one has suggested that [petitioner] ever sought to convey to anyone a desire to communicate with the police only through the medium of counsel. This case was litigated on a constitutional level as a Sixth Amendment matter all along, not as a Fifth Amendment one. Never was it alleged that the authorities failed to scrupulously honor [petitioner's] wishes with respect to counsel." Pet. App. 66a.

regarding his desire to consult with counsel. The Court of Military Appeals concluded in that case that the proper course is for the police to suspend the interrogation and seek to resolve the ambiguity by determining the suspect's wishes with respect to counsel. Only if the suspect makes clear that he does not wish to consult with counsel before being questioned further may the interrogation continue. In our brief in the *Davis* case, we agreed with the analysis of the Court of Military Appeals and urged this Court to adopt that view.

Petitioner argues that this case should be controlled by the rule that the Court adopts in *Davis*, and he urges the Court to adopt the same reasoning that the Court of Military Appeals adopted in that case. In fact, however, this case is readily distinguishable from *Davis* and therefore is not likely to be affected by the outcome of that case. In *Davis*, the suspect made a statement during questioning that could be interpreted as an invocation of the right to counsel. In this case, by contrast, petitioner made no such statement at any point during the various interrogation sessions in which he participated.

The only involvement of a lawyer in petitioner's case was the appointment of a military lawyer, who consulted with him during the brief period he was in military custody. But petitioner never indicated in any way, either before or during his civilian interrogation, that he wanted to consult with the military lawyer who had been appointed for him, or with any other lawyer. As both courts below concluded, the unsolicited appointment of a lawyer to assist a suspect cannot be equated to the invocation of counsel that triggered the right to counsel in *Miranda*, *Edwards*, and *Minnick*. Nor, by the same token, can the unsolicited appointment of a lawyer be regarded as equivalent to an ambiguous reference to counsel of the sort that requires the interrogating officers to

clarify the suspect's wishes. There is therefore no need to hold this case pending the decision in *Davis*.

b. At bottom, petitioner's claim is based on the assertion that his conduct in consulting with his counsel should be construed as an invocation of the right to counsel, even though there is nothing in the record to indicate that petitioner requested counsel, expressly or by implication, at any point before or during questioning. Both courts below found against petitioner on that fact-bound question, see Pet. App. 4a-5a, 37a-38a, and there is no reason for this Court to disturb that conclusion.[6]

The Court of Military Appeals correctly distinguished the facts of this case from those of *Minnick*. The critical fact in *Minnick*, which is absent here, is that in *Minnick* the suspect requested counsel. It was that request—not the subsequent consultation with counsel—that the Court regarded as the invocation of the right to counsel that triggered the applicability of *Miranda* and *Edwards* in Minnick's case. That request, or its functional equivalent, is the element that was missing here. Further review by this Court is therefore unwarranted.

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[6] In the first appeal to the Court of Military Appeals, Chief Judge Everett assumed that petitioner must have requested a lawyer, since R.C.M. 305(f) requires that an attorney be appointed for a servicemember who requests one and since an attorney was appointed to represent petitioner while he was in custody. Pet. App. 68a-74a. That assumption, however, is in error. In the military, counsel may be, and often is, appointed for a servicemember in custody based on the fact of custody alone, regardless of whether the servicemember has asked to speak with an attorney.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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